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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 YOLANDA MCGRAW, individually,
8 and as the representative of all persons
9 similarly situated,

10 Plaintiff,

11 v.

12 GEICO GENERAL INSURANCE
13 COMPANY,

14 Defendant.

CASE NO. C16-5876BHS

AMENDED ORDER
GRANTING PLAINTIFF'S
MOTION TO REMAND AND
DENYING PLAINTIFF'S
MOTION TO STRIKE AS
MOOT

15 This matter comes before the Court on Plaintiff Yolanda McGraw's ("McGraw")
16 motion to remand (Dkt. 19) and motion to strike declarations of Defendant's experts
17 (Dkt. 39). The Court has considered the pleadings filed in support of and in opposition to
18 the motions and the remainder of the file and hereby rules as follows:

19 **I. PROCEDURAL HISTORY**

20 On March 13, 2014, McGraw was involved in a car accident. Dkt. 1, Ex. A
21 ("Comp.") ¶ 1.8. McGraw's car was damaged, and the repairs cost \$8,140.07. *Id.*
22 McGraw's car was worth less after it was repaired than before the accident. *Id.* ¶ 1.10.

1 McGraw had a car insurance policy with Defendant GEICO General Insurance Company
2 (“GEICO”). *Id.* ¶ 1.9. McGraw sought underinsured motorist coverage under her
3 GEICO policy. *Id.* GEICO did not compensate McGraw for her car’s diminished value.
4 *Id.* ¶ 1.11.

5 On April 17, 2015, McGraw filed a class action complaint against GEICO in
6 Pierce County Superior Court. *See id.* McGraw claims that GEICO has continuously
7 failed to pay its policyholders’ diminished value loss. *Id.* ¶ 5.1. McGraw seeks to certify
8 the following class:

9 All GEICO insureds with Washington policies issued in Washington
10 State, where the insureds’ vehicle damages were covered under
Underinsured Motorist coverage, and

- 11 1. The repair estimates on the vehicle (including any
supplements) totaled at least \$1,000; and
- 12 2. The vehicle was no more than six years old (model year plus
13 five years) and had less than 90,000 miles on it at the time of
the accident; and
- 14 3. The vehicle suffered structural (frame) damage and/or
deformed sheet metal and/or required body or paint work.

15 Excluded from the Class are (a) claims involving leased vehicles or
16 total losses, and (b) the assigned judge, the judge’s staff and family.

17 *Id.* ¶ 5.3. McGraw alleges that the number of class members will be about 2,586 and the
18 average damages will be about \$1,460 per class member. *Id.* ¶ 2.4. Based on these
19 numbers, McGraw alleges that the amount in controversy is \$3,775,560. *See id.*
20 McGraw asserts a single breach of contract claim. *Id.* ¶¶ 6.1–6.5.

21 On May 20, 2015, GEICO removed the matter to this Court. *McGraw v. Geico*
22 *Gen. Ins. Co.*, C15-5336BHS (W.D. Wash.) (“*McGraw I*”). On September 8, 2015, the

1 Court granted McGraw’s motion to remand because GEICO had “failed to establish by a
2 preponderance of the evidence that CAFA’s amount in controversy requirement is
3 satisfied in this case.” *McGraw v. Geico Gen. Ins. Co.*, C15-5336BHS, 2015 WL
4 5228027, at *4 (W.D. Wash. Sept. 8, 2015). On the issue of attorneys’ fees, the Court
5 rejected GEICO’s argument that attorneys’ fees should be included in the amount in
6 controversy under either the Washington Consumer Protection Act or Insurance Fair
7 Conduct Act because neither of these claims was in McGraw’s complaint. *Id.*

8 On October 13, 2016, GEICO removed the matter to this Court for a second time.
9 Dkt. 1. GEICO alleges that “[a] sampling of GEICO’s records reveals an average of
10 \$1,698.99 per claim with a potential class size including as many as 2734 claims for a
11 total of \$4,645,038.66 in potential class member claims.” *Id.* ¶ 22. GEICO also alleges
12 that the class would be entitled to attorney’s fees under the Ninth Circuit benchmark for
13 class actions, McGraw’s retainer agreement with her attorney, or *Olympic Steamship Co.*
14 *v. Centennial Ins. Co.*, 117 Wn.2d 37 (1991) (en banc). *Id.* ¶¶ 23–25.

15 On November 14, 2016, McGraw moved to remand. Dkt. 19. On December 5,
16 2016, GEICO responded. Dkt. 25. On January 6, 2017, McGraw replied (Dkt. 37) and
17 moved to strike the declarations of GEICO’s experts (Dkt. 39).¹ On January 23, 2017,
18 GEICO responded to the motion to strike. Dkt. 41. On January 27, 2017, McGraw
19 responded. Dkt. 43.

22 ¹ The motion to strike is denied as moot.

1 On February 27, 2017, the Court granted McGraw’s motion to remand. Dkt. 49.
2 In relevant part, the Court held that *Olympic Steamship* fees were not available because
3 this was a dispute involving the value of McGraw’s claim and not a coverage dispute. *Id.*
4 On March 9, 2017, GEICO filed a motion to stay, a motion for leave to file an overlength
5 brief, and a motion for reconsideration. Dkts. 51–53. On March 13, 2017, the Court
6 granted the motion to stay and the motion for leave and requested a response from
7 McGraw to the motion for reconsideration. Dkt. 55. On March 21, 2017, McGraw
8 responded. Dkt. 57. On March 24, 2017, GEICO replied. Dkt. 58.

9 II. DISCUSSION

10 A. Motion to Remand

11 “A defendant generally may remove a civil action if a federal district court would
12 have original jurisdiction over the action.” *Allen v. Boeing Co.*, 784 F.3d 625, 628 (9th
13 Cir. 2015). CAFA vests federal district courts with original jurisdiction over class
14 actions involving more than 100 class members, minimal diversity, and at least
15 \$5,000,000 in controversy, exclusive of interests and costs. *Dart Cherokee Basin*
16 *Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014) (citing 28 U.S.C. § 1332(d)). A
17 defendant seeking removal under CAFA must file a notice of removal “containing a short
18 and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a); *see also Dart*
19 *Cherokee*, 135 S. Ct. at 551. The burden of establishing removal jurisdiction remains on
20 the party seeking removal. *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 685
21 (9th Cir. 2006). There is no presumption against removal under CAFA. *Dart Cherokee*,
22 135 S. Ct. at 554.

1 To satisfy CAFA's amount in controversy requirement, the removing defendant
2 must plausibly allege in the notice of removal that the amount in controversy exceeds
3 \$5,000,000. *Id.* If the plaintiff challenges the defendant's allegation, the defendant must
4 then establish by a preponderance of the evidence that CAFA's amount in controversy
5 requirement has been satisfied. *Id.* at 554. "CAFA's requirements are to be tested by
6 consideration of real evidence and the reality of what is at stake in the litigation, using
7 reasonable assumptions underlying the defendant's theory of damages exposure." *Ibarra*
8 *v. Manheim Invs., Inc.*, 775 F.3d 1193, 1198 (9th Cir. 2015). Both parties may submit
9 evidence outside the complaint, including affidavits, declarations, or other summary-
10 judgment-type evidence. *Id.* at 1197. "Under this system, a defendant cannot establish
11 removal jurisdiction by mere speculation and conjecture, with unreasonable
12 assumptions." *Id.*

13 In this case, the parties' dispute regarding actual damages is irrelevant because the
14 key issue is whether attorney's fees should be included in the amount in controversy.
15 Even if the Court finds that GEICO established its alleged amount of actual damages with
16 evidence and reasonable assumptions, the jurisdictional minimum is not met by this
17 amount alone. *See* Dkt. 1 at ¶ 22 ("a total of \$4,645,038.66 in potential class member
18 claims."). Thus, GEICO alleges that attorney's fees should be included in the amount in
19 controversy to overcome the jurisdictional minimum. *Id.* ¶¶ 23–25. On this issue, the
20 Ninth Circuit has held "that where an underlying statute authorizes an award of attorneys'
21 fees, either with mandatory or discretionary language, such fees may be included in the
22 amount in controversy." *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir.

1 1998). Under this authority, GEICO advances three theories for including attorney’s fees
2 in the amount in controversy. Dkt. 25 at 16–20.

3 First, GEICO alleges that “the Ninth Circuit commonly employs a 25%
4 benchmark in calculating awardable fees” Dkt. 1 ¶23. McGraw argues that the 25%
5 benchmark is only applicable in class action settlement cases where the fees are paid out
6 of a common settlement fund. Dkt. 19 at 15–16. The Court agrees and finds that such a
7 calculation method is not a reasonable method of calculating the amount in controversy
8 by including *additional* attorney’s fees.² Moreover, this is not an underlying explicit
9 authorization of fees as contemplated in *Galt G/S*. Accordingly, the Court declines to add
10 any amount of “benchmark” fees to the alleged actual damages.

11 Second, GEICO alleges that McGraw agreed to pay her counsel 33% of the gross
12 profits if successful. Dkt. 1 at ¶ 24. McGraw argues that, even if true, the payment
13 would come from the gross proceeds and it is frivolous to argue that such an amount
14 should be added to alleged actual damages. Dkt. 19 at 16. The Court agrees, and GEICO
15 fails to respond to this argument. Moreover, this is not an underlying explicit
16 authorization of fees as contemplated in *Galt G/S*. Accordingly, the Court concludes that
17 this argument is without merit.

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20 ² The Court recognizes that it suggested the possibility of the opposite conclusion in a
21 prior case. *See Levy v. Salcor, Inc.*, C14-5022 BHS, 2014 WL 775443, at *5 (W.D. Wash. Feb.
22 25, 2014). That statement, however, is at most dicta because it was irrelevant to the final
calculation of the jurisdictional minimum, which relied on “an even more conservative estimate
of \$500,000 in statutory fees” *Id.*

1 Third, GEICO alleges that, under the *Olympic Steamship* doctrine, “attorneys’ fees
2 may be awarded if Plaintiff prevails, and attorneys’ fees must therefore be included in the
3 amount in controversy for removal purposes.” Dkt. 1 at ¶ 25. While neither party
4 addresses the fact that *Olympic Steamship* fees are not fees authorized by an underlying
5 statute as explicitly held in *Galt G/S*, 142 F.3d at 1156, the Ninth Circuit provided dicta
6 that would seem to authorize fees authorized by case law. For example, the court stated
7 that “[w]hen the applicable *substantive law* makes the award of an attorney’s fee
8 discretionary, a claim that this discretion should be exercised in favor of plaintiff makes
9 the requested fee part of the amount in controversy.” *Galt G/S*, 142 F.3d at 1155
10 (emphasis added) (citing 14A Charles Alan Wright & Arthur R. Miller, Federal Practice
11 and Procedure § 3712 at 178 (1985)). In *Zidell Marine Corp. v. Beneficial Fire & Cas.*
12 *Ins. Co.*, C03-5131 RBL, 2003 WL 27176596, at *5 (W.D. Wash. Dec. 4, 2003), the
13 court cited the preceding language and “disagree[d] with [defendants’] contention that
14 attorneys’ fees are properly included in the amount in controversy only when authorized
15 by contract or statute.” Similarly, the Court concludes that, whether the fees are
16 authorized by contract, statute, or case law, they may be included in the amount in
17 controversy.

18 The next issue is whether *Olympic Steamship* fees are awardable in this case.
19 “*Olympic Steamship* . . . fees are available when the insurer or surety unsuccessfully
20 denies coverage.” *King Cty. v. Vinci Const. Grands Projets*, 191 Wn. App. 142, 188
21 (2015).

1 But such fees are not available if the dispute is merely about the
2 value of the claim. In other words, attorney fees are available in cases
3 involving coverage disputes, which generally concern interpretation of the
4 meaning or application of a policy or bond. In contrast, claim disputes
5 raise factual questions about the extent of the insured's damages. They
6 involve factual questions of liability, injuries, and damages.

7 Olympic Steamship has been read broadly by Washington courts.
8 The only articulated limitation to this rule is that no fees are awarded when
9 the insurer does not dispute coverage, but merely disputes the value of the
10 claim. Thus, the "claims dispute" exception to Olympic Steamship attorney
11 fees is narrow. It applies where the surety or insurer acknowledges
12 coverage, agrees to pay under the policy or bond, but disputes the value of
13 the claim.

14 *Id.* at 188–89 (internal citations and quotations omitted).

15 GEICO argues that this is a coverage dispute, Dkt. 25 at 17–19, while McGraw
16 argues that this is a claim dispute, Dkt. 19 at 5, 17–19. If this is a coverage dispute, then
17 the timing of GEICO's removal is important. "The timeliness of removals pursuant to
18 CAFA is governed by 28 U.S.C. § 1446(b)." *Carvalho v. Equifax Info. Servs., LLC*, 629
19 F.3d 876, 884 (9th Cir. 2010). "[S]ection 1446(b) identifies two thirty-day periods for
20 removing a case." *Id.* at 885. "The first thirty-day removal period is triggered 'if the
21 case stated by the initial pleading is removable on its face.'" *Id.* (quoting *Harris v.*
22 *Bankers Life & Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005)). "The second thirty-day
removal period is triggered if the initial pleading does not indicate that the case is
removable, and the defendant receives 'a copy of an amended pleading, motion, order or
other paper' from which removability may first be ascertained." *Id.* (quoting 28 U.S.C.
§ 1446(b)). "If the notice of removal was untimely, a plaintiff may move to remand the
case back to state court." *Id.*

1 **1. Coverage Dispute**

2 GEICO contends that McGraw’s “complaint specifically alleged that she was
3 litigating coverage issues.” Dkt. 53 at 9. The Court agrees that, if this truly is a coverage
4 dispute, then it was apparent from the face of the complaint. For example, McGraw
5 alleged that “GEICO continuously denied [her] coverage for diminution of value
6 damages.” Comp. ¶ 1.12. McGraw also alleged that, although she “took the appropriate
7 measures to receive compensation from GEICO for the damages she incurred, GEICO on
8 numerous occasions, denied [her] coverage for diminution of value damages.” *Id.* ¶ 5.5.
9 These allegations are sufficient to show that McGraw was alleging that GEICO denied
10 coverage for her claim. Thus, under this interpretation of the complaint, *Olympic*
11 *Steamship* fees were available based on the face of the complaint.

12 In a coverage dispute, GEICO must show that *Olympic Steamship* fees would
13 potentially be no less than \$354,961.34, but no more than \$1,634,700. The lower bound
14 is calculated by subtracting GEICO’s alleged actual damages in this removal from the
15 jurisdictional minimum of \$5,000,000. *See* Dkt. 1 ¶ 22 (“a total of \$4,645,038.66 in
16 potential class member claims.”). The upper bound is calculated by subtracting what the
17 Court concluded were reasonable damages in the first removal from the jurisdictional
18 minimum. *See McGraw*, 2015 WL 5228027 at *4 (“amount in controversy is more likely
19 than not around \$3,365,300.”). This spectrum is appropriate because (1) if the potential
20 fees exceed the upper bound, then removal was apparent from the face of the complaint
21 or (2) if the potential fees would not meet the lower bound, removal is inappropriate now.
22

1 Based on its own actions, GEICO bears the burden of showing that the potential fees fall
2 within this range. *Abrego*, 443 F.3d at 685.

3 Even GEICO contends that it is impossible to determine attorney fees and costs
4 with such precision. *See* Dkt. 25 at 19 (“no one knows at this point in time how many
5 hours may be reasonable.”); Dkt. 53 at 7 (“It was thus impossible for GEICO to *prove* the
6 likely range of attorneys’ fees, which would vary substantially based on how the
7 litigation ultimately took shape (and whether the Plaintiff ultimately qualified for such an
8 award).”). Regarding the lower bound, the most reasonable assumption is that GEICO’s
9 newly recognized coverage issue may be disposed of with a simple, straightforward
10 dispositive motion based on the controlling case of *Moeller v. Farmers Ins. Co. of*
11 *Washington*, 173 Wn.2d 264 (2011). In this scenario, fees awarded for the coverage issue
12 would be segregated from fees awarded for the claim dispute. ““If attorney fees are
13 recoverable for only some of a party’s claims, the award must properly reflect a
14 segregation of the time spent on issues for which fees are authorized from time spent on
15 other issues,’ even where the claims overlap or are interrelated.” *King Cty.*, 191 Wn.
16 App. at 187 (quoting *Mayer v. City of Seattle*, 102 Wn. App. 66, 79–80 (2000)). GEICO
17 objects to this characterization of the issue and argues that it is an improper assumption
18 against jurisdiction. Dkt. 53 at 6. The Court agrees that, as evidenced by the litigation
19 history, McGraw’s fees could potentially exceed \$354,961.34 if a court determines that
20 coverage was interrelated to all other issues in this matter. Thus, the Court must evaluate
21 whether fees would exceed the upper bound and if removal was timely.
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1 In the first removal, GEICO argued that “[a]ttorneys’ fees in a class action like the
2 one asserted here can be very substantial, particularly given the number of issues that are
3 going to be contested here.” *McGraw I*, Dkt. 25 at 19. In fact, GEICO asserted that
4 attorney’s fees could be in excess of “6.6 million.” *Id.* Actual litigation has laid none of
5 these concerns to rest. With two removals and a potential appeal *before* class
6 certification has been considered, the Court concludes that the potential for actual fees
7 incurred could easily exceed the upper bound of \$1,634,700. Given this conclusion, the
8 Court must evaluate whether the issue of coverage and potential fees were apparent from
9 the face of the complaint.

10 As a matter of interpretation, “coverage” means “coverage.” There is no
11 indication that McGraw was acting as her own lexicographer in drafting the complaint.
12 GEICO, however, argues that McGraw’s expert gave new meaning to the term
13 “coverage” during his deposition. Dkt. 25 at 3–7; Dkt. 58 at 4. This argument is without
14 merit. While a new theory of damages calculation or similar circumstance may result in a
15 new understanding of the allegations in a complaint, GEICO fails to show that an
16 expert’s deposition may provide the grounds for a new interpretation of one of the most
17 common phrases in insurance law. When a plaintiff contests coverage in her complaint,
18 the insurer must be on notice that coverage is at issue, otherwise crafty attorneys would
19 conceive of new grounds for removal every time a deposition occurs. *Hill v. Blind Indus.*
20 *& Servs. of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999), *opinion amended on denial of*
21 *reh’g*, 201 F.3d 1186 (9th Cir. 1999) (“diversity jurisdiction is determined at the time the
22 action commences”). To its own detriment, GEICO admits that it didn’t raise the

1 possibility of *Olympic Steamship* fees in the initial removal. Dkt. 58 at 4. Because the
2 complaint asserts allegations contesting coverage, GEICO should have raised this issue
3 during the initial removal period. It did not do so, and it is untimely to raise the issue
4 now. Therefore, even if McGraw actually contests coverage, which she asserts she does
5 not, GEICO's removal is untimely and the Court grants McGraw's motion to remand.

6 **2. Value Dispute**

7 If McGraw presents only a claim value dispute, then *Olympic Steamship* fees may
8 not be awarded and jurisdiction is lacking. Not only did GEICO's 30(b)(6) representative
9 testify that diminished value is not excluded by the contract of insurance, Dkt. 4-51, Exh.
10 1 at 19, but McGraw would be a questionable representative for a class based on a denial
11 of coverage claim. McGraw alleges that GEICO accepted her uninsured motorist claim
12 and adjusted part of her claimed loss, but "has failed to fairly and adequately compensate
13 [her] diminution of value damages." Comp. ¶¶ 1.10–1.12. Based on these allegations, it
14 is a more reasonable assumption that this case involves "factual questions of liability,
15 injuries, and damages" instead of "interpretation of the meaning or application of a policy
16" *King Cty.*, 191 Wn. App. at 188–89. In fact, McGraw specifically alleges that the
17 "language in the policies falling within the Class has been authoritatively construed in
18 [*Moeller*, 173 Wn.2d at 276] as providing diminished value coverage." Comp. ¶ 4.3
19 (emphasis omitted). Regardless, it is undisputed that the amount in controversy is below
20 the jurisdictional minimum without the inclusion of attorney's fees. Thus, the Court
21 grants McGraw's motion to remand if the complaint does not contest coverage.
22

1 **B. Attorney's Fees and Costs**

2 "An order remanding the case may require payment of just costs and any actual
3 expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. §
4 1447(c). "Absent unusual circumstances, courts may award attorney's fees under §
5 1447(c) only where the removing party lacked an objectively reasonable basis for seeking
6 removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). "[T]he standard
7 for awarding fees should turn on the reasonableness of the removal." *Id.* The plaintiff
8 does not have to prove that the defendant's "action was frivolous, unreasonable, or
9 without foundation," because "there is no basis here for a strong bias against fee awards."
10 *Id.* at 138.

11 The process of removing a case to federal court and then having it
12 remanded back to state court delays resolution of the case, imposes
13 additional costs on both parties, and wastes judicial resources. Assessing
14 costs and fees on remand reduces the attractiveness of removal as a method
15 for delaying litigation and imposing costs on the plaintiff. The appropriate
16 test for awarding fees under § 1447(c) should recognize the desire to deter
17 removals sought for the purpose of prolonging litigation and imposing costs
18 on the opposing party, while not undermining Congress' basic decision to
19 afford defendants a right to remove as a general matter, when the statutory
20 criteria are satisfied.

21 *Id.* at 140.

22 While GEICO's improper removal delayed the proceedings, increased McGraw's
costs of litigation, and wasted judicial resources, the Court is unable to conclude that an
award of fees is warranted. McGraw must concede that her complaint contains
allegations alluding to GEICO's denial of coverage. *See, e.g.*, Comp. ¶ 1.12 ("Although
Plaintiff took the appropriate measures to receive compensation from GEICO for the

1 damages she incurred, GEICO continuously denied Plaintiff's coverage for diminution of
2 value damages."'). Based on a literal reading of these allegations, the Court is unable to
3 conclude that it was objectively unreasonable to base removal on the possibility of an
4 award of *Olympic Steamship* fees. Thus, GEICO avoids an award of fees in this matter
5 based on one reasonable argument.

6 **III. ORDER**

7 Therefore, it is hereby **ORDERED** that McGraw's motion to remand (Dkt. 19) is
8 **GRANTED** and motion to strike declarations of Defendant's experts (Dkt. 39) is
9 **DENIED as moot**. The stay is lifted, and the Clerk shall remand this action to Pierce
10 County Superior Court and close this case.

11 Dated this 18th day of April, 2017.

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14 **BENJAMIN H. SETTLE**
15 United States District Judge
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